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In The

Supreme Court of the United States

October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Does the self-incrimination clause of the Fifth Amendment require the suppression of three confessions, each made after proper Miranda warnings and three valid waivers of rights, solely because an attorney, unrequested by the defendant, was given misleading information by a police officer that there would be no further interrogation of the defendant that night and the defendant was not informed of the attorney's telephone call?

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit which granted Respondent's petition for a writ of habeas corpus is reported sub nom *Burbine v. Moran* at 753 F.2d 178 (1st Cir. 1985) and is reprinted at App. 1-22 in the Petitioner's Appendix to Petition for Writ of Certiorari. The Opinion of the United States District Court for the District of Rhode Island which denied Respondent's petition for a writ of habeas corpus is reported sub nom. *Burbine v. Moran* at 589 F. Supp. 1245

(D.R.I., 1984) and is reprinted at App. 23-43 in the Petitioner's Appendix To Petition for Writ of Certiorari. The Opinion of the Rhode Island Supreme Court initially denying Respondent's direct appeal of his conviction in state court is reported sub nom. *State v. Burbine,* at 430 A.2d 438 (R.I. 1981) and is reprinted at App. 44 in the Petitioner's Appendix To Petition for Writ of Certiorari. The Opinion of the Rhode Island Supreme Court's denial of Respondent's direct appeal after reargument is reported sub nom *State v. Burbine* at 451 A.2d 22 (R.I. 1982) and appears at App. 45-91 in the Petitioner's Appendix To Petition for Writ of Certiorari.

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STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the First Circuit granting the Respondent's petition for a writ of habeas corpus was entered on January 25, 1985, (Pet. App. 92) and its mandate entered on February 19, 1985. (Pet. App. 93) The Petition for a Writ of Certiorari was filed on March 19, 1985, and the Petition for a Writ was granted on May 13, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

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CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual serv-

ice in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

—o—

STATEMENT OF THE CASE

Brian Burbine (the Respondent herein) was indicted for the crime of murder as the result of the death of a woman named Mary Jo Hickey. (T. 13-14)[1] Mary Jo Hickey was found unconscious in a factory parking lot in Providence, Rhode Island on the morning of March 3, 1977. (T. 22) Her stockings and panties were pulled down around her ankles and her coat was pulled up over her waist. (T. 43) There was blood on her face, a pair of dentures and a pool of blood-like substance on the ground. (T. 45) There was also in the area of her hips a small puddle of a white milky substance (T. 47) later identified as seminal fluid. (T. 149-150) Still showing signs of life, although suffering from injuries to her skull and brain resulting from bludgeon wounds inflicted by a 9½ foot metal pipe found near the scene of the attack, she was taken by rescue squad to the hospital. (T. 58, 59, 62-64) Approximately three weeks later, on March 25, 1977, she died. (T. 129)

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[1] The transcripts which are part of the record are designated as follows: Suppression Hearing; February 15, 16, 19, 20, 1979, as "S.H."; Trial Transcript, Volume I, February 21, 22, 23, 27, 1979 and Volume II, February 20 and March 1, 2, 1979 as "T."

On March 4, 1977, Brian Burbine left Rhode Island to visit his friends, Nancy Jean Sanders James and her brother, Donald Sparks, at their home in Maine. He told them he had gotten into some trouble and wanted to get out of Rhode Island for awhile. (T. 174-175, 300) After a few weeks had passed, Burbine told Nancy James that he had met Mary Jo Hickey in a bar in Providence on the evening of March 2, 1977. Mary Jo had bought him some drinks and then asked for a ride home. Burbine further stated that on the way to her house, he pulled into a parking lot and made advances to Mary. When the advances were resisted, Burbine slapped her "a time or two" and threw her out of the car. This had all happened before he came to Maine. (T. 176-177) Burbine told substantially the same story to Donald Sparks but added that there was some blood on Mary, as a result of his striking her (T. 302) and that he had used Lysol and Ammonia to wash blood from the interior of his automobile the next morning. (T. 303) While in Maine Burbine called his mother every day and one day after he called home he said he was going home "to straighten it out". (T. 183-184)

A few months later, at about 3:30 p.m. June 29, 1977, police in Cranston, Rhode Island, arrested and charged three men in connection with a breaking and entering. (T. 188) Burbine was one of them and Donald Sparks was another. The third man was named DiOrio. For purposes of interrogation, they were placed in separate rooms in the detective's division in the basement of the Cranston police headquarters. It was learned that DiOrio and Burbine lived at 306 New York Avenue. (T. 188) When Detective Ferranti of the Cranston Police was informed of this fact, he recalled that he had been told two days ear-

lier by a confidential informant that a man named "Butch" living at 306 New York Avenue was responsible for the death of Mary Jo Hickey. (T. 188) Between 5:00 and 6:00 p.m. Ferranti learned from DiOrio that Burbine was the only "Butch" living at that address. (T. 189) Detective Ferranti then went to the room where Burbine was being held. Ferranti informed Burbine of his *Miranda* rights, but at this point Burbine refused to sign a waiver of rights form and refused to say anything further. However, he did respond that he was the only person called "Butch" who resided at 306 New York Avenue. (T. 190)

At about 6:00 p.m., after obtaining from DiOrio and Sparks statements implicating Burbine in the killing of Mary Jo Hickey, Ferranti, cognizant that Mary Jo's murder had occurred in Providence, not Cranston, called the Providence Police to convey what he had discovered. At approximately 7:00 p.m., three officers of the Providence Police, Detectives Bernard Gannon and Edward Trafford and their supervisor, Captain Wilson, arrived at the Cranston Police headquarters and went to the detective division for the purpose of questioning Burbine about the killing of Mary Jo. They spoke first with Detective Ferranti and then questioned Sparks and DiOrio. (T. 191-192)

At approximately 7:45 p.m. Burbine's sister called the Office of the Public Defender (without her brother's knowledge), to seek legal assistance for him. (S.H. 72) Her sole concern was the break-in, as at that time she had no knowledge that he was a suspect in Mary Jo's death. She asked for Assistant Public Defender Richard Casparian, who had previously represented her brother in another criminal matter not related to the instant reason for his police custody. In fact, Burbine had missed an

appointment with Casparian the afternoon of his arrest. As soon as Burbine's sister hung up, the person who happened to be working late and had taken the call tried to reach Casparian. Once it was determined that he was unavailable, Allegra Munson, another Assistant Public Defender, was contacted and informed of the situation. (S.H. 71-75)

At approximately 8:15 p.m. Munson called the Cranston police station (S.H. 244) and asked that her call be transferred to the detective division. (S.H. 249) A male voice responded with the word "Detectives". (S.H. 250) Munson identified herself and asked if Brian Burbine was being held (T. 555); the person responded affirmatively. (S.H. 250) Ms. Munson explained to the person that Burbine was represented by Attorney Casparian who was not available; she further stated that she would "make herself available" in the event that the police intended to place him in a lineup or question him. (S.H. 251, 254) Munson did not ask to speak with Burbine (T. 560), nor did she inquire as to why he was in custody. (S.H. 256, T. 559) She did not mention the homicide investigation which she was unaware of at that time. The unidentified person told Munson that the police would not be questioning Burbine or putting him in a lineup and that "we're through with him for the night." (S.H. 244, 251) He indicated that Burbine would be brought to court the following morning for arraignment on the breaking and entering charge. (S.H. 258) Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary Jo's murder. (S.H. 261) She did not ask for the name of the person with whom she was speaking, although she assumed he was a detective

(T. 564) and she did not ask the officer who answered the telephone to give any message to Burbine, (T. 560) nor did she give the police officers any instructions or requests concerning Burbine. (S.H. 257-258) As she did not know Brian Burbine and he would have no way of knowing who she was, (T. 560) Ms. Munson did not "think it was appropriate to give information to a client on the telephone when they didn't know you and you didn't know them". (T. 560) Munson also did not give the officer any information as to where she could be reached if anything changed during the evening or ask if he was the detective in charge of the particular case. (S.H. 258)

The next morning Ms. Munson prepared a memorandum of her telephone call (S.H. 253) but apparently no further attempt was made to assist Burbine. (S.H. 259) A public defender did not appear at the Providence police station until summoned by the Providence police at noontime June 30, 1977, although Burbine still stated he did not wish an attorney, (T. 487) because Burbine was to be placed in a lineup and it was police policy to obtain an attorney at such time. (T. 481-482)

Who at the headquarters was speaking to Ms. Munson has never been determined. Ms. Munson had neglected to ask his identity and all of the officers questioned in court concerning the incident denied receiving or knowing about the call. It should be noted that there is no evidence to indicate that the Providence Police (or Ferranti for that matter) were made aware of Munson's call until long after Burbine had given his statements. Burbine was never aware of a telephone call from an attorney inquiring about him. (S.H. 216) He was never told of Munson's call, her offer of assistance, or the information that was given her.

At approximately 9:00 p.m., Burbine was brought to the main room in the detective division where Ferranti and his immediate superior, Lieutenant Ricard, and the three Providence officers had gathered. (T. 438-439) After being advised of his rights, he was asked about the Hickey killing and, appearing "fidgety", denied involvement. (S. H. 153) He was then returned to the smaller room. (S.H. 153) About ten minutes later, Ferranti heard repeated banging on the door of the room and went to speak with Burbine. (S.H. 154) He was crying and said he was "disgusted"; "sorry"; and wanted to confess. (S.H. 154) Ferranti went to get two of the Providence officers, Detective Gannon and Trafford, and the three of them brought Burbine to the main room to take a statement. (S.H. 155) The detectives then read Burbine his *Miranda* rights, ascertained that he understood what his Miranda rights were, and at about 9:30 p.m. obtained his signature on a waiver of rights form. (S.H. 155-159) (Pet. App. G.) He was later described as having been "shaky at times", but as having spoken clearly. (S.H. 157) For the next fifty minutes, Detective Gannon conducted the interrogation, typing his questions and Burbine's answers. At 10:20 p.m., Burbine signed a typed four-page inculpatory statement and Detective Ferranti "notarized" it. (S.H. 159) (Pet. App. H)

Burbine was then returned to the smaller room, where there was a phone available to him and given food. (S.H. 23, 85, 160) Sometime between approximately 10:45 p.m. and 11:00 p.m., he said he had omitted some information and was returned to the main room. (S.H. 160) He was again read his *Miranda* rights, signed the waiver form, (S.H. 161) (Pet. App. I), and gave a second statement. (S.H. 163) (Pet. App. J) This one was signed at 11:20 p.m.

Finally, at approximately noon the following day, June 30, 1977, following his presentation to the District Court on the breaking and entering charge, Burbine was taken to the Providence Police Headquarters, where he again was given his *Miranda* rights and signed a waiver form. (Pet. App. K) Burbine then gave a third inculpatory statement, this time to Detective Trafford. (Pet. App. L) (S.H. 89-96) After this third confession had been obtained, at the request of Trafford, Major John Leyden called the office of the Public Defender to obtain the presence of an attorney, Burbine still declining to request one, for an identification lineup that was to follow. (S.H. 95) Later that day, Assistant Public Defender Casparian came to the Providence headquarters and assisted Burbine during the lineup.(S.H. 191)

At the subsequent hearing on Burbine's motion to suppress his three written statements, the Superior Court found that Ms. Munson did make the phone call, as described above, but also "that there was no collusion or conspiracy on the part of the police 'to secrete [Burbine] from his attorney . . .' " *State v. Burbine*, 451 A.2d at 24. (Pet. App. 114) It also found that Burbine was not threatened, coerced, or promised any benefits in exchange for his three statements and that Burbine had "knowingly, intelligently and voluntarily waived" his right to counsel and his privilege against self-incrimination. Id. at 24. (Pet. App. 116)

In accordance with these findings, the court denied Burbine's motion to suppress. (Pet. App. 117) Burbine was subsequently convicted of first degree murder on the basis of his three statements and the testimony of Nancy James, Donald Sparks, and other witnesses.

Burbine appealed the denial of his suppression motion to the Supreme Court of Rhode Island, which affirmed the lower courts decision. (Pet. App. 44, 45) Burbine then petitioned the United States District Court of Rhode Island for a writ of habeas corpus, alleging Fifth, Sixth, and Fourteenth Amendment violations. The District Court reviewed the record of the State proceedings and denied the habeas corpus petition in an order and opinion dated June 7, 1984 by United States District Judge Bruce Selya. (Pet. App. 23)

Burbine filed a notice of appeal from the District Court's order denying his petition on June 21, 1984, and a certificate of probable cause was granted by the District Court.

Burbine alleged in his appeal before the United States Court of Appeals for the First Circuit that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the failure of police to communicate to his attorney their plans to interrogate him and their failure to tell him that an attorney acting for him at the request of his sister had called to offer her services. That court did not reach Burbine's Sixth and Fourteenth Amendment claims but reversed the district court's denial of the petition for the writ of habeas corpus on the ground that the failure of the police to communicate to Burbine that an attorney had called offering assistance and the misleading advice given to the attorney, violated Burbine's Fifth Amendment right to counsel and his privilege against self-incrimination and held that all three of the inculpatory statements that he made while in custody should have been suppressed. (Pet. App. 21)

Burbine is presently serving his sentence at the Rhode Island Adult Correctional Institution in Cranston, Rhode Island and will be eligible for parole in July, 1987.

The sole issue in this case is whether or not the court of appeals erred in ruling that Burbine was denied his right to counsel and privilege against self-incrimination, guaranteed by the Fifth Amendment to the United States Constitution.

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SUMMARY OF ARGUMENT

The decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) provides a set of police guidelines to assure that a criminal suspect's right under the Fifth Amendment to the United States Constitution that he shall not be compelled to be a witness against himself is protected. These rules provide a number of personal "rights", including the right to counsel and right to silence, which may be waived only by the suspect. If the suspect, after being properly informed of his rights, then waives any of these rights, a heavy burden rests on the government to prove that the suspect did so knowingly, intelligently and voluntarily. In analyzing the validity of a waiver of rights, the Court will consider all of the facts in the case, and review the totality of the circumstances surrounding the waiver. Predominantly these facts fall into two classes: (1) the personal characteristics of the suspect as they bear upon his ability to make an effective waiver, and (2) the conduct of the police in eliciting the waiver. If the Court, after considering such facts, finds a valid waiver, the additional factor of the appearance of an unrequested attorney, who may inquire concerning the suspect; be given misleading advice

by the police concerning his situation; which information is not transmitted to the suspect; should not affect the suspect's ability to knowingly and intelligently waive his *Miranda* rights. In deciding that these factors can affect a suspect's ability to make a knowing waiver of his rights, the First Circuit has not only ignored the factual findings made by the preceding courts in this case, but has in effect denigrated the suspect to a nonperson whose will is subject to his attorney's control.

In addition, the First Circuit has taken upon itself to supervise police performance by establishing its own guidelines for police to follow when approached by a suspect's attorney. This is clearly not the appropriate role of the First Circuit in reviewing a petition for writ of habeas corpus.

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ARGUMENT

INTRODUCTION

At issue in this case is whether, after properly waiving his Fifth Amendment rights on three occasions and giving three confessions to the police, the respondent, Brian Burbine, can later claim that because an attorney, whom he did not request, had called the police station; been told by an unidentified police officer that Burbine was not going to be further questioned that night; and Burbine had not been informed of this call, that his waivers were not made voluntarily and knowingly. Although the trial judge, the jury, the Supreme Court of the State of Rhode Island, and the Federal District Court for the District of Rhode Island all found Burbine's confessions were voluntary and made following intelligent

waivers of the right to counsel and right to remain silent, the First Circuit Court of Appeals held that the added factor of the telephone call to the police station, wherein the attorney was given misleading information and of which Burbine was not informed, was more than just one factor in the calculus of waiver and clearly vitiated any claim that Burbine's waiver of counsel was knowing and voluntary.

The Petitioner challenges the decision of the First Circuit Court arguing that the Fifth Amendment to the United States Constitution and the prophylactic *Miranda* rights are personal rights of the suspect and can be waived by him knowingly, intelligently and voluntarily without the advice or presence of counsel. Moreover, the facts of this case substantiate the findings of the State and Federal District Court to this effect, whereas the decision of the First Circuit Court is unsupported by the evidence; is clearly an effort to exercise case by case supervision of police performance, and requires reversal.

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS A PERSONAL RIGHT OF THE INDIVIDUAL AND IS SUBJECT TO WAIVER ONLY BY THAT INDIVIDUAL.

The Fifth Amendment of the Constitution of the United States provides that no person "shall be compelled in any criminal case to be a witness against himself." This Court's decision in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) was the culmination of it's attempt through the years to find a means of striking a balance between societal need for police interrogation and the protection of the accused from undue coercive

pressures. The *Miranda* decision imposed a set of rules upon every police officer who might seek to interrogate a person suspected of crime who had been taken into custody or whose freedom has been inhibited in a significant way. These rules, which would on their face appear to be relatively simple to recite and apply, require the following admonitions be given to the suspect; (1) that he has a right to remain silent; (2) that anything which he might say can be used against him in a court of law; (3) that he has a right to the presence of an attorney; (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Id. 384 U.S. at 467-70. These rights, however, are not indelibly etched in granite and this court's holding in *Miranda* does not completely forbid questioning of a suspect in the absence of counsel, for it went on to say:

> "After such warnings have been given and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Id. at 479.

By this decision the extension of the privilege against self-incrimination from the courtroom into the police station was made complete. Cases following *Miranda* have examined and clarified the Miranda rules and their relationship to the right to counsel. Once the dual elements of custody plus interrogation are present, the necessity for Miranda warnings exists and the burden of providing these warnings was placed squarely upon the police. This court required all law enforcement officials to respect

without equivocation a suspect's request for counsel or assertion of the right to remain silent.

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person envokes this privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cutoff questioning, the setting of incustody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent"
>
> ". . .
>
> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. at 473-75.

It is important to read these words carefully for it is noticible that no where in the Miranda opinion, or in succeeding cases, is it indicated that the right to counsel may be asserted by anyone other than the accused. The strength of Miranda lies in its simplicity. It was designed as a set of sharp bright-line directions which police officers could easily follow "to assure that the individual's right to choose

between silence and speech remains unfettered throughout the interrogation process." Id. at 469. We have recently been reminded in *Oregon v. Elstad*, 105 S.Ct. 1285, at 1291 (1985) that this Court in *New York v. Quarles*, 467 U.S. —, — 1984 has noted that

> "The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); see *Edwards v. Arizona*, 451 U.S. 477, 492 (1981) (Powell, J., concurring). Requiring Miranda warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right."

Nowhere in the *Miranda* decision does it say that the Fifth Amendment Right is anything but personal to the suspect. Nowhere does it say that attorneys have the right to be present at a suspect's interrogation, or the right to speak to a suspect in custody, or the right to claim on his behalf a suspect's Fifth Amendment privilege against self-incrimination. If this were so, this Court would certainly have included such directives in its instructions to the police.

This Court in *Michigan v. Mosley*, 423 U.S. 96 (1975), in interpreting the requirement of *Miranda* that once the individual indicates in any manner at anytime prior to or during questioning, that he wishes to remain silent, the interrogation must cease, declared that *Miranda* "directed that 'the interrogation must cease' until an attorney is present 'only' [if] the individual states that he wants an attorney.' " 423 U.S. at 104 n. 10, quoting 384 U.S. at 474. And in *Brewer v. Williams*, 430 U.S. 387, at 419 (1977) Chief Justice Burger, dissenting, states:

"But Constitutional rights are *personal*, and an otherwise valid waiver should not be brushed aside by judges simply because an attorney was not present. The Court's holding operates to 'imprison a man in his privileges,' . . . It denigrates an individual to a non-person whose free will has become hostage to a lawyer so that until the lawyer consents, the suspect is deprived of any legal right or power to decide for himself that he wishes to make a disclosure. It denies that the rights to counsel and silence are personal, nondelegable, and subject to a waiver only by that individual. (footnote omitted)"

II. THE WAIVER OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION MUST BE MADE KNOWINGLY AND VOLUNTARILY AND A HEAVY BURDEN RESTS ON THE GOVERNMENT TO PROVE SUCH.

Once it has been determined that the Fifth Amendment is a personal right of the suspect, and that only he can waive his *Miranda* safeguards of that right, the next step is to determine whether he has done so knowingly and voluntarily. The determination whether an accused has knowingly and voluntarily waived his *Miranda* rights depends on all of the facts of each particular case. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1970) This Court has directed lower courts to review the totality of the circumstances surrounding the waiver. These circumstances include the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) But the factors making up the totality of the circumstances have never been specifically outlined by this Court. Lower courts, in analyzing the validity of a waiver of rights have referred to factors which fall predominantly into two classes: (1) the personal characteristics of the suspect

as they bear upon his ability to make an effective waiver, and (2) the conduct of the police in eliciting the waiver. If the conduct of the police is too overbearing on the suspect's will or if the suspect's personal traits or condition render it unlikely that he is capable of making an intelligent decision, then any waiver of rights made by such a suspect would most probably not be considered effective under the heavy "burden" standard placed upon the state to prove a valid waiver. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) The suspect's personal traits include age, level of intelligence, amount of education, prior experience with the police, influence of drugs or medication, and ability to read and speak English. And this Court in *Miranda*, in addressing the proper police conduct, held that "Any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Id. at 476 This Court has also stated that "a lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so." Id. at 476 And although an express, written waiver may be persuasive evidence, the trial justice must nevertheless examine the circumstances and facts in their totality to determine whether waiver has in fact occurred. *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979)

In Rhode Island, when the voluntariness of an extrajudicial statement or confession is challenged, the trial judge must conduct an evidentiary hearing outside the

presence of the jury in order to determine admissibility under constitutional standards. The statement or confession may be admitted only if the trial judge is persuaded by clear and convincing evidence that it was not illegally obtained. *State v. Benton*, 413 A.2d 104, 109 (R.I. 1980) If the statement is admitted into evidence, under Rhode Island law the question of voluntariness is again submitted to the jury. Thus the practice in Rhode Island provides a criminal defendant with the constitutionally required "reliable and clear cut determination that the confession was in fact voluntarily rendered." *Lego v. Twomey*, 404 U.S. 477, 489 (1972) On appeal, if the Rhode Island Supreme Court is satisfied that the trial justice adequately and correctly applied the procedures, it examines the record in the light most favorable to the prevailing party and reverses only if it finds that the decision of the trial justice was clearly erroneous. *State v. Killay*, 430 A.2d 418, 421 (R.I. 1981)

III. THREE COURTS, INCLUDING THE STATE TRIAL COURT, THE STATE SUPREME COURT AND THE FEDERAL DISTRICT COURT HELD THAT THE PROSECUTION SUCCESSFULLY SUSTAINED THE WEIGHTY BURDEN OF PROVING THAT THE RESPONDENT'S WAIVERS WERE MADE KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WITHOUT THE ADVICE OF AN UNREQUESTED ATTORNEY.

In reviewing the testimony before the trial court concerning Burbine's three waivers of rights and three confessions, the Rhode Island Supreme Court found the evidence overwhelming in support of the trial justice's find-

ing that Burbine was admonished of the right to remain silent and of his right to retained or apponted counsel. (Pet. App. 63) It was noted that Burbine had previously been represented by the public defenders office. (Pet. App. 63) The record shows he was not unfamiliar with the ritual of criminal proceedings; he was involved, immediately prior to his arrest, with the defense of unrelated criminal charges agains him, (S.H. 111, 240-241) There is nothing in the record to suggest Burbine was illiterate or lacked the capacity to understand or to appreciate his rights; in fact a close reading of the testimony, particularly that of Lt. Gannon, reveals that Burbine was advised of the full spectrum of his Constitutional perogatives at least three times in a thorough, indeed meticulos, manner (S.H. 24-30, 34-37); that he acknowledged his comprehension of those rights (S.H. 25, 34); and that he specifically agreed to speak with the Providence officers without the presence of counsel. (S.H. 27, 63) There is no suggestion here of police brutality, or of coercion, psychological duress, illicit inducement, intimidation, or the like. Burbine was not grilled for long stretches of time, nor in unusually oppressive circumstances.

Moreover, since Burbine was at the time being represented by Attorney Casparian in connection with another criminal case, indeed the record shows that he had a scheduled appointment with the attorney on the very day of his apprehension by the Cranston police, (S.H. 190) he must have been aware that contact with Casparian was among his options as the interrogation began and continued. He did not avail himself of any of his many opportunities to do so. The record reveals that a telephone was available to him at all times (S.H. 23)

and he knew his sister had called the police station and that she had gotten him help previously when he was arrested. (S.H. 216, 220) Yet, he did not choose to remain silent and wait. As late as the beginning of his third confession, (shortly after noon the next day on June 30) after a court appearance and a transfer to the Providence police station, he told Trafford that he did not want the services of counsel. (S.H. 93, 95)

Considering all of these facts, the Rhode Island Supreme Court, stating that the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys, (Pet. App. 60) found it hardly conceivable that the additional information that an attorney whom Burbine did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver. (Pet. App. 63-64)

The Federal District Court, in addressing Burbine's habeas corpus petition, and reviewing whether the State had shouldered its burden to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel[2] paid substantial deference to the state court's findings of historical fact. *Sumner v. Mata*, 455 U.S. at 597 (Pet. App. 27)

The District Court agreed with the Rhode Island Supreme Court that

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[2] *Brewer v. Williams*, 430 U.S. 387, 397 n. 4 (1977).

> " . . . petitioner's right against self-incrimination is personal; it cannot be invoked or waived by anyone other than the person to whom the right attaches . . . Even if [the police] conduct infringed on an existing attorney-client relationship . . . , it could not violate petitioner's Fifth Amendment right not to incriminate himself unless the conversation itself somehow affected *petitioner's* capacity to invoke his rights". *Burbine v. Moran*, 589 F. Supp. at 1251 (Pet. App. 36)

Reviewing the record the District Court found that the police "were hardly withholding vital information" in failing to mention Munson's call to Burbine. (Pet. App. 39)

> "Nor can Burbine persuasively argue that the failure of the police to inform him of Munson's call, or the alleged imparting of misleading information to the attorney, severally or collectively constituted chicanery sufficient to vitiate his seriatim waivers. While it is true that trickery can annul a superficially valid surrender of fifth amendment rights, *Miranda*, (citations omitted) that doctrine is not called into play on these facts. The trial judge specifically cleared the police of any collusion or attempt to deceive; and the State Supreme Court, *Burbine II*, 451 A.2d at 29-30 n. 5, presented an entirely plausible explanation for the seeming inconsistency in the trial court's findings. (the Superior Court having coupled its exoneration of the police officers with a finding that Munson had indeed called). More importantly, Burbine had an ongoing professional relationship with the public defender's office; and therefore, knew not only of his right to the assistance of counsel but of his entree to the public defender should he wish assistance from that source. . . ."
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> "Finally, it should be noted that the petitioner waived his rights not on one isolated occasion, but three times within less than a day (in the last instance, after having been brought before a judicial affirm). And, the second statement came about at Burbine's

instigation, when he volunteered that he had forgotten to mention something of consequence in his first confession (S.H. 33) At no time, apart from his declination of Ferranti's original invitation to talk,[3] did he essay to halt the questioning and to stand upon his right to remain silent—and the record reflects that he was specifically advised of his right to draw the line at any given point.[4] The record persuasively indicates that the Providence police were both painstaking and assiduous in their attention to the *Miranda* commandments. From and after Burbine's first contact with the Providence police, the course of his conduct "evidenced a firm, abiding, calculated, and continuing intention to waive his right against self-incrimination and his right to counsel." *Fuentes I*, 572 F. Supp. at 1473. He had several meaningful opportunities to maintain his silence but he forebore. And, there is scant reason to believe that news of Munson's inquiry, even if revealed, would have constituted a consequential datum or would have deflected Burbine from his self-appointed rounds. *Burbine v. Moran*, 589 F. Supp. at 1252 (Pet. App. 38-40)

Based on this reasoning, after assessing the circumstances of the case as a whole, the District Court held the State Court's finding that the prosecution successfully sustained the weighty burden of establishing that petitioner's waiver was made sentiently, intelligently, and in the free exercise of volitional judgment is supportable. *Burbine v. Moran*, 589 F.Supp. at 1253 (Pet. App. 40)

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[3] Even this demurrer was less than complete; Burbine did give Ferranti some helpful information about his sobriquet and place of residence. *See, e.g., Burbine II*, 451 A.2d at 23.

[4] In Lt. Gannon's words: "I made it clear to him that at anytime he wanted to he could terminate the statement, and at anytime he felt he wanted to call a lawyer, once again, that he should terminate the statement and obtain a lawyer". (S.H. 29)

IV. THE FIRST CIRCUIT COURT OF APPEALS FOUND THAT AN OTHERWISE VALID WAIVER OF FIFTH AMENDMENT MIRANDA RIGHTS CAN BE VITIATED BY THE ADDITIONAL FACTOR OF AN INQUIRY FROM AN UNREQUESTED ATTORNEY, IF THE ATTORNEY IS DILIGENT; THE POLICE HAVE ACTED RECKLESSLY IN PROVIDING MISLEADING INFORMATION; AND THE SUSPECT IS NOT INFORMED OF THE TELEPHONE CALL.

Three courts, (which included four opportunities for Burbine to contest the voluntariness of his waivers) having determined that lack of knowledge of Munson's telephone call could not have, and in fact did not, affect the knowing and voluntary waiver by Burbine of his Fifth Amendment privilege, he nevertheless continued to the next level of appellate review and finally succeeded in persuading the First Circuit Court of Appeals that his "Fifth Amendment right to counsel and privilege against self-incrimination were violated and that all three of the inculpatory statements that he made while in custody should have been suppressed." *Burbine v. Moran*, 753 F.2d 178 at 187 (Pet. App. 21) The First Circuit analyzed the totality of facts and circumstances surrounding Burbine's waiver and, excluding evidence concerning the alleged telephone call, found a valid waiver. This is not the kind of Fifth Amendment case in which direct physical or psychological pressure from the police is claimed to have overborne the will of a suspect. *Burbine v. Moran*, 753 F.2d 178, at 184 (Pet. App. 12) But the court then proceeded to assess to what extent the additional factor of a refusal to inform a suspect of the availability of specific counsel can be said to

infect an otherwise valid waiver. Id. at 184. The Court took into account three factors in assessing the effect of this phone call on Burbine and the voluntariness of his waiver of counsel; the withholding from Burbine of the fact that Attorney Munson had called; the withholding of the fact that Munson had been told there would be no questioning or lineup that night; and the conduct of the police in effecting the withholding. The Circuit Court found that this information would have conveyed a message to Burbine that a diligent attorney was available and that the police were now changing the ground rules as they had told her he was not to be questioned that night. With this information he might very well have decided to hold his interrogators to their word. Id. at 185 (Pet. App. 14) In addition the Circuit Court considered whether the conduct of the police amounted to trickery or other blameworthy action, and determined that the refusal to tell Burbine of Attorney Munson's call could only be explained as deliberate or reckless irresponsibility of the person who responded to the call. Id. at 185 (Pet. App. 15)[5]

V. THE FIRST CIRCUIT RULING DISREGARDS THE EVIDENCE AS FOUND BY THE LOWER COURTS AND IS NOT BASED ON A VIOLATION OF CONSTITUTIONAL STANDARDS.

The problem with the analysis of the First Circuit is obvious in the following statement: "Our problem is not

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[5] In *State v. Beck*, 687 S.W.2d 155 (Mo., 1985) an attorney requested that she be notified before any questioning of the defendant took place and the sheriff failed to inform the defendant or to disclose to the attorney that the prosecutor had advised him he had no legal duty to first notify her before at-

(Continued on following page)

that the finding of lack of collusion or conspiracy is unsupported, but that it does not cover the other relevant possible police responses." Id. at 185 (Pet. App. 16) There were no facts in the record to explain the circumstances of the receipt of the unverified phone call at the Cranston police station. The credibility of the police officers who denied receiving or hearing about the phone call was determined in their favor by the trial judge who found no collusion and by the jury which found Burbine's waiver voluntary. This Court in *Oregon v. Bradshaw*, 103 S.Ct. 2830, at 2835 (1983), in reviewing the findings of the state trial court as to whether the respondent's statements to a polygraph examiner were voluntary and a knowing waiver of his right to remain silent, said we have no reason to dispute these conclusions, based as they are upon the trial court's first-hand observation of the witnesses to the events involved. And in this same case Justice Powell, concurring in the judgment of the court, said "But the question of whether a suspect has waived this important right to counsel is uniquely one of fact, and usually must and should be left to the judgment of the trial court that has had the benefit of hearing the evidence and assessing the weight and credibility of testimony." Id. 103 S.Ct., at 2838

The Rhode Island Supreme Court and the District Court rationalized that the apparent incongruity of the findings (that a call had been made, which no one had been

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(Continued from previous page)

tempting to seek a valid waiver and statement from the defendant. The Missouri Supreme Court said that the term "deceit" was far too harsh and simply inaccurate in describing the sheriff's actions in not notifying the attorney and held that the defendant knowingly and intelligently elected to waive his right to counsel. See also *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983) cert. denied 103 S.Ct. 3544; *Blanks v. State*, No. 41673, Ga. Sup. Ct., (June 10, 1985) 37 CrL 2250, 7-3-85.

found to receive) could be explained by the fact that the Cranston police were investigating one crime, the breaking and entering, while the Providence police were investigating another, the murder of Mary Jo Hickey, and that the recipient of Ms. Munson's call was merely referring to the former. *State v. Burbine*, 451 A.2d at 29-30 n. 5 The Circuit Court swept aside this explanation as based on assumptions unsupported by the record. 753 F. 2d at 186 (Pet. App. 17) Although the record does show that Cranston Detective Ferranti testified the breaking and entering case was a police department case, the detective division did not present Burbine for arraignment the next morning and there could have been more than two detectives working that night as they had another murder they were investigating; (S.H. 166, 179) Providence Police Detective Lieutenant Gannon testified there were transits, he assumed to be policemen, through the area; (T. 376, 377) and Providence Detective Trafford testified that he first saw Burbine around 9 o'clock going through the main guard room with a uniformed Cranston police officer. (S.H. 105-106) The First Circuit discounted this testimony and instead created an entirely new assumption which has absolutely no factual basis in the record. There is not one specific fact in the record to indicate recklessness.

In reviewing the record it also becomes clear that the First Circuit has decided to ignore the facts that Burbine appeared anxious to clear his conscience. He called his mother every day from Maine to discuss Mary Jo's condition (T. 183); he told Donald Sparks and Nancy what he had done (T. 176-177, 301-303) and one day after talking on the telephone said he was going home to "straighten it out"; and he told the police he was "disgusted" and "sor-

ry'' and wanted to "confess'' (S.H. 154). He also testified that he heard the police talking to his sister. He knew she had gotten him help in the past, yet he did not wait, but proceeded to tell them his story. In addition, the First Circuit's determination that Attorney Munson in this case was diligent, as opposed to the "half-hearted'', feckless effort to be of service which it attributed to the attorney in *Fuentes v. Moran,* 733 F.2d 176 (1st Cir. 1984), and which caused the waiver in that case to be held voluntary, does not seem to follow from the record where she testified that she did not inquire with whom she was speaking, did not ask what the charges were against Burbine, did not request that she be informed if there were any further developments, did not request to speak to Burbine or that any message be given to him and did not attempt to contact him the next morning although she knew he was incarcerated. (S.H. 257-259)

It seems obvious that it is the factual findings of the trial court, upheld by the State Supreme Court and the Federal District Court which are supported in the record and therefore should be upheld. *Sumner v. Mata,* 455 U.S. 591, 592 (1982)

VI. THE CIRST CIRCUIT COURT IS ASSUMING A SUPERVISORY ROLE OVER THE RHODE ISLAND SUPREME COURT INSTEAD OF ABIDING BY THE LIMITED SCOPE OF REVIEW OF A WRIT OF HABEAS CORPUS, AND HAS ESTABLISHED AN ADDITIONAL SET OF CONFUSING GUIDELINES FOR THE POLICE TO FOLLOW WHEN INTERROGATING AN INDIVIDUAL SUSPECTED OF COMMITTING A CRIME.

The First Circuit is in effect assuming a supervisory role over the Rhode Island Supreme Court and taking upon

itself to determine when and if police action is proper in dealing with attorney requests concerning defendants in custody for interrogation. In *Fuentes* the First Circuit stated " . . . some of the questions or contrary inferences we have noted indicate how careful law enforcement officials must be in dealing with suspects and lawyers during the investigatory phase of a prosecution." *Fuentes v. Moran*, 733 F.2d at 181 This statement clearly reveals the First Circuit's interest in reviewing police behavior. On appeal from a United States District Court's denial of a state prisoner's application for habeas corpus the review by the Court of Appeals is the narrow one . . . and not the broad exercise of supervisory power that the court could possess in regard to its own trial court. *Donnelly v. De Christofaro*, 416 U.S. 637 (1974) A writ of habeas corpus has limited scope: the federal courts do not sit to retry state cases de novo but rather to review for violation of federal constitutional standards. *Milton v. Wainwright*, 407 U.S. 371 (1972)

In this case the First Circuit appears to confuse the Fifth Amendment's right against self-incrimination and its subsidiary *Miranda* rights with the Sixth Amendment's right to counsel. The *Miranda* standards were met in this case. This is not an issue of Sixth Amendment right to counsel. The Constitution does not guarantee that a criminal suspect is entitled to the assistance of counsel during all encounters with the police in which investigation of crime is the primary police motive. Rather, the Sixth Amendment guarantees the assistance of counsel only after adversarial proceedings have commenced against the suspect, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Brewer v. Williams*, 430 U.S. 387, 398. In *United States v. Gouveia*, — U.S. —, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984) this Court

reaffirmed "that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." Id. at —, 104 S.Ct. at 2297.

Neither the Rhode Island Supreme Court, the federal district court nor the First Circuit have accepted the *per se* New York rule, based on that state's constitution, sometimes referred to as the *Donovan-Arthur-Hobson* rule,[6] whose principle is that once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches and may not be waived in the absence of counsel. The rule would appear to be at odds with the expressed opinion of this Court in *Brewer v. Williams*, supra, wherein this Court observed:

> "The Court of appeals did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." (Footnote omitted.) 430 U.S. at 405-06, 97 S.Ct. at 1243, 51 L.Ed. 2d at 441.

Rather, in determining whether the suspect has made a knowing as well as voluntary choice, in the sense of not being coerced, to speak without a lawyer's advice, these courts have considered the effect of an attorney's call to the police station inquiring about the suspect, and the failure of the police to inform the suspect of this call, in the totality of the circumstances surrounding his waiver.

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[6] *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S. 419 (1976); *People v. Arthur*, 22 N.Y.2d 325, 239 N.E. 2d 537, 292 N.Y.S.2d 663 (1968); *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

In doing so, the result has been that the First Circuit has now in effect established a new and additional set of guidelines to those of Miranda for the police to follow. The ruling of the First Circuit is such: "Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, is more than just one factor in the calculus of waiver. This combination of circumstances clearly vitiates any claim that a waiver of counsel was knowing and voluntary." *Burbine v. Moran*, 753 F.2d at 187 (Pet. App. 20) The First Circuit is now requiring the police to answer their telephones with trepidation. First it must be determined who is calling, does this attorney have a legitimate, professionally ethical interest in the suspect, has the attorney expressed in proper words his interest or has he made a merely "feckless" effort on the suspect's behalf. The courts will now be reviewing whether a proper attorney client relationship existed; if so, whether the attorney acted with the proper diligence" in his client's interest, and whether the actions of the police were deliberate or reckless, or perhaps merely negligent,[7] in misleading the attorney. If these factors of attorney diligence and his or her deliberate or reckless misleading by the police are found, and for some reason the suspect is not informed of the call, there can be no knowing and voluntary waiver. In other words, the First Circuit has concluded that in such instances it is not the free

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[7] The First Circuit left the result of a "merely negligent" failure to communicate for another day. *Burbine* v. *Moran* (Pet. App. 21)

choice and will of the suspect, based on the information provided by the Miranda rights, and his own experience, intelligence and needs that determines if his waiver was valid and his confession voluntary and knowing but the external circumstances of the attorney's ability to ask the right questions and the police to make the proper response. The hypotheses to be drawn from this situation are endless. To the extreme can be pictured the retaining of an attorney for purposes of his registering with the local police his availability and his request to be present if his client is ever arrested and interrogated, thereby placing on the police the duty upon arrest of a suspect to immediately check this registration list for counsel. This list could extend to a nationally computerized list, meaning suspects arrested and interrogated anywhere in the country, as well as merely outside the police station, would be "protected" by this registration.[8]

The absurdity of the ruling of the First Circuit in this case has not been unanticipated. We have here the very set of circumstances Mr. Justice White foresaw in his dissenting opinion in *Miranda:*

> "All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That Amendment deals with compelling the accused himself. It is his free will that is invoked. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled

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[8] The New York rule as interpreted in *People v. Gunner,* 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965) has been given such effect as to bar the use of an inculpatory statement made by a suspect in California after the defense lawyer telephoned the Nassau County chief of police in New York that he was representing the defendant.

> are barred. . . The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege." Id. 384 U.S. 536-537

The Circuit Court's ruling in this case will allow an attorney's telephone call to the switchboard of the police station to frustrate the investigation of crimes. It has extended the precept of Miranda that once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. *Miranda,* in establishing a standardized procedure or "bright line" rule,[9] has specified what legal facts must be provided a suspect for him to knowingly waive his rights in a custodial setting. This Court has never "embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness . . . we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the

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[9] " . . . *Miranda* is a standardized procedure" or "bright line" rule *par excellence*—although it happens to be a "bright line" rule in favor of the defendant. You cannot begin to understand *Miranda,* or hope to defend it, unless you remember what preceded it—a "voluntariness"—"totality of the circumstances" test that was elusive, unruly and largely unworkable—a test that provided precious little guidance to the police or to the courts in the front line.

A "bright line" rule is a *relatively* readily understood and easily applied rule designed to produce the right result *in most cases.* It is designed to relieve the police and the lower courts of the burden of making exceedingly difficult case-by-case judgments. Volume Four, The Supreme Court: Trends and Developments 1981-1982 by Jesse Choper, Yale Kamisar, Laurence Tribe, Chapter 20, *Panel Discussion,* p. 233

consequences flowing from the nature and the quality of the evidence in the case." *Oregon v. Esltad,* 105 S.Ct. at 1297-1298.

Miranda sought to add clarity to the law; to protect an individual's Fifth Amendment privilege against self-incrimination by excluding coerced confessions as evidence. The *Miranda* guidelines were to deter the police from using improper interrogation practices and violating the rights of the accused. If this is so then these rights should be the same for all citizens. The ruling of the First Circuit in this case shifts these "rights" from citizen to citizen. Even Professor Yale Kamisar, a prominent exponent of the rights of the accused, criticizes the type of court ruling which does not turn on a suspect's request for counsel, but allows a suspect, who fails to ask for a lawyer, to subsequently succeed in suppressing his confession because a lawyer who previously represented the client learns of his former client's plight and comes to the rescue on his own initiative; or his family retains a lawyer on his behalf, without his knowledge or even request for a lawyer, and this lawyer enters the proceeding in the nick of time.

If these *Miranda* warnings are good enough for the suspect who has not, or whose family or friends have not, contacted a lawyer or whose lawyer has not managed to win the race to the stationhouse or telephone, why are they not sufficient for the suspect who, or whose family, has the money and the connection to bring a lawyer swiftly into the fray? Should not the indigent or recluse be accorded the same rights and privileges as the affluent or sociable? At its worst, this ruling would seem to favor

the professional criminal with his standby attorney most of all.

> "There is not even a weak congruence—indeed, there is no congruence at all—between a defense lawyer's entry into the proceeding and a suspect's need for 'a lawyer's help' or the government's need for evidence. Whatever its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he 'spring(s) to the telephone' hardly seems a rational way of reconciling the interests of the accused with those of society." Y. Kamisar, Brewer v. Williams, Massiah, and Miranda: *What is "interrogation"? When Does it Matter?* in Police Interrogation and Confession, p. 220 (1980)

The decision of the First Circuit Court of Appeals is not only unsupported by the evidence in this case and an attempt to exercise supervisory control over the Supreme Court of the State of Rhode Island but is an arbitrary ruling capable of creating chaos in the uniform administration of justice for all.

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CONCLUSION

For the reasons stated and upon the authorities cited, the judgment of the First Circuit Court of Appeals should be reversed and the case should be remanded for entry of judgment in favor of the petitioner.

Respectfully submitted,

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